

## Johnson v. Transportation Agency, Santa Clara County

### 480 U.S. 616 (1987)

#### OPINION BY JUSTICE BRENNAN:

Respondent, Transportation Agency of Santa Clara County, California, unilaterally promulgated an Affirmative Action Plan applicable, inter alia [among other things], to promotions of employees. In selecting applicants for the promotional position of road dispatcher, the Agency, pursuant to the Plan, passed over petitioner Paul Johnson, a male employee, and promoted a female employee applicant, Diane Joyce. The question for decision is whether in making the promotion the Agency impermissibly took into account the sex of the applicants in violation of Title VII of the Civil Rights Act of 1964. \* \* \*

In December 1978, Santa Clara . . . adopted an affirmative action plan for the County Transportation Agency. \* \* \* [T]he Agency Plan provides that, in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant.

In reviewing the composition of its work force, the Agency noted in its Plan that women were represented in numbers far less than their proportion of the County labor force in both the Agency as a whole and in five of seven job categories. Specifically, while women constituted 36.4% of the area labor market, they composed only 22.4% of Agency employees. Furthermore, women working at the Agency were concentrated largely in EEOC job categories traditionally held by women. . . . As for the job classification relevant to this case, none of the 238 Skilled Craft Worker positions was held by a woman. \* \* \*

On December 12, 1979, the Agency announced a vacancy for the promotional position of road dispatcher. \* \* \* Nine of the applicants, including Joyce and Johnson, were deemed qualified for the job, and were interviewed by a two-person board. Seven of the applicants scored above 70 on this interview, which meant that they were certified as eligible for selection by the appointing authority. The scores awarded ranged from 70 to 80. Johnson was tied for second with a score of 75, while Joyce ranked next with a score of 73. A second interview was conducted by three Agency supervisors, who ultimately recommended that Johnson be promoted. Prior to the second interview, Joyce

had contacted the County's Affirmative Action Office because she feared that her application might not receive disinterested review [due to prior disagreements with two of the interviewers]. The Office in turn contacted the Agency's Affirmative Action Coordinator. \* \* \* The Coordinator recommended to the Director of the Agency, James Graebner, that Joyce be promoted. \* \* \* Graebner, authorized to choose any of the seven persons deemed eligible, thus had the benefit of suggestions by the second interview panel and by the Agency Coordinator in arriving at his decision. After deliberation, Graebner concluded that the promotion should be given to Joyce. \* \* \*

The assessment of the legality of the Agency Plan must be guided by our decision in *Weber*. In that case, the Court addressed the question whether the employer violated Title VII by adopting a voluntary affirmative action plan designed to "eliminate manifest racial imbalances in traditionally segregated job categories." The respondent employee in that case challenged the employer's denial of his application for a position in a newly established craft training program, contending that the employer's selection process impermissibly took into account the race of the applicants. The selection process was guided by an affirmative action plan, which provided that 50% of the new trainees were to be black until the percentage of black skilled craft workers in the employer's plant approximated the percentage of blacks in the local labor force. Adoption of the plan had been prompted by the fact that only 5 of 273, or 1.83%, of skilled craft workers at the plant were black, even though the work force in the area was approximately 39% black. Because of the historical exclusion of blacks from craft positions, the employer regarded its former policy of hiring trained outsiders as inadequate to redress the imbalance in its work force.

We upheld the employer's decision to select less senior black applicants over the white respondent, for we found that taking race into account was consistent with Title VII's objective of "[breaking] down old patterns of racial segregation and hierarchy." As we stated:

*It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary,*

*private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.*

We noted that the plan did not “unnecessarily trammel the interests of the white employees,” since it did not require “the discharge of white workers and their replacement with new black hires.” Nor did the plan create “an absolute bar to the advancement of white employees,” since half of those trained in the new program were to be white. Finally, we observed that the plan was a temporary measure, not designed to maintain racial balance, but to “eliminate a manifest racial imbalance.” As JUSTICE BLACKMUN’s concurrence made clear, Weber held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an “arguable violation” on its part. Rather, it need point only to a “conspicuous . . . imbalance in traditionally segregated job categories.” Our decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII’s purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts. \* \* \*

In reviewing the employment decision at issue in this case, \* \* \* [t]he first issue is therefore whether consideration of the sex of applicants for Skilled Craft jobs was justified by the existence of a “manifest imbalance” that reflected underrepresentation of women in “traditionally segregated job categories.” In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer’s workforce with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise. Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. \* \* \* If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to “achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of available qualified minority applicants. . . .”

The Agency’s Plan emphatically did not authorize such blind hiring. It expressly directed that numerous factors be taken into account in making hiring decisions, including specifically the qualifications of female applicants for particular jobs. Thus, despite the fact

that no precise short-term goal was yet in place for the Skilled Craft category in mid-1980, the Agency’s management nevertheless had been clearly instructed that they were not to hire solely by reference to statistics. The fact that only the long-term goal had been established for this category posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard.

Furthermore, in considering the candidates for the road dispatcher position in 1980, the Agency hardly needed to rely on a refined short-term goal to realize that it had a significant problem of underrepresentation that required attention. Given the obvious imbalance in the Skilled Craft category, and given the Agency’s commitment to eliminating such imbalances, it was plainly not unreasonable for the Agency to determine that it was appropriate to consider as one factor the sex of Ms. Joyce in making its decision. The promotion of Joyce thus satisfies the first requirement enunciated in *Weber*, since it was undertaken to further an affirmative action plan designed to eliminate Agency work force imbalances in traditionally segregated job categories.

We next consider whether the Agency Plan unnecessarily trammelled the rights of male employees or created an absolute bar to their advancement. \* \* \* [T]he Plan sets aside no positions for women. The Plan expressly states that “[the] ‘goals’ established for each Division should not be construed as ‘quotas’ that must be met.” Rather, the Plan merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants. As the Agency Director testified, the sex of Joyce was but one of numerous factors he took into account in arriving at his decision. \* \* \* [T]he Agency Plan requires women to compete with all other qualified applicants. No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants.

In addition, petitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate, firmly rooted expectation on the part of petitioner. Furthermore, while petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.

Finally, the Agency’s Plan was intended to attain a balanced work force, not to maintain one. \* \* \* The

Agency acknowledged the difficulties that it would confront in remedying the imbalance in its work force, and it anticipated only gradual increases in the representation of minorities and women. It is thus unsurprising that the Plan contains no explicit end date, for the Agency's flexible, case-by-case approach was not expected to yield success in a brief period of time. Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. \* \* \*

We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force.

Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace. Accordingly, the judgment of the Court of Appeals is [a]ffirmed.

#### CASE QUESTIONS

1. What was the legal issue in this case? What did the Supreme Court decide?
2. What does this case reveal about the conditions under which affirmative action is legal?
3. What evidence did the county have of the need for affirmative action?
4. Why does the Court conclude that the measures used to implement the county's affirmative action plan do not unduly burden white males such as Johnson?
5. Do you agree with this decision? Why or why not?

*Johnson* points to some basic requirements for affirmative action plans under Title VII. First, the only reason that Santa Clara County was able to defend its consideration of candidates' sex in the promotion decision was that it did, in fact, have an affirmative action plan. Absent a formal, written affirmative action plan, it would not have worked for the county to claim that it was just trying to help women or that it was committed to diversity. Thus, an employer that wants to consider protected class characteristics when making employment decisions to enhance the employment of women and persons of color can do so only if a formal affirmative action plan is in place.

The case also makes it clear that affirmative action must be remedial in nature to be legal. Although it is not necessary under Title VII to establish that the employer has discriminated prior to instituting affirmative action, the plan must address a "manifest imbalance" in the protected class composition of the employer's workforce.<sup>15</sup> Put differently, the plan must be designed to remedy the "underutilization" of women and people of color. Affirmative action cannot be used to maintain the racial or gender balance of an employer's workforce; it can only be used to remedy the underutilization of women and people of color in particular jobs. Affirmative action is a temporary measure that must not continue after the identified underutilization has been eliminated. Although the failure to cite a specific expiration date was not fatal in *Johnson*, the case suggests that plans calling for more aggressive use of preferences require clearer evidence of their temporary nature.

The Court upheld the use of affirmative action in *Johnson* not only because of the clear underutilization of women in skilled crafts but also because the means used to pursue affirmative action goals were moderate and not unduly burdensome on males. Specifically, the plan did not establish quotas (i.e., rigidly adhered-to requirements, such as a specified number or percentage of new hires that must be women) or set aside positions only for women. Nor did the plan result in the hiring of unqualified persons. Instead, sex was considered among many other factors, and the female candidate selected was judged to be only slightly less qualified through the agency's interview process. Employers engaging

<sup>15</sup> *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).